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February 16, 2021

By ECF
The Honorable Judge Gabriel W. Gorenstein
United States Magistrate Judge
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Chanel, Inc. v. The RealReal, Inc., No. 18-cv-10626-VSB-GWG

Dear Judge Gorenstein:

We represent Defendant The RealReal, Inc. ("TRR") in the above-referenced matter. We respectfully request the Court's permission to file a short sur-reply letter, of no more than three pages, because Chanel's February 5, 2021 reply letter (ECF No. 115) raises a new issue for the first time.[1] *See e.g., Stepski* v. *M/V Norasia Alya*, No.

[1] The other arguments that Chanel raises in its reply letter are largely repetitive of the arguments briefed in its opening brief, and they fail for the same reasons. For instance, instead of addressing whether Chanel will be prejudiced by TRR's proposed counterclaims given that TRR has already asserted its unclean hands defense, Chanel focuses on the sufficiency of the original affirmative defense. Chanel also attempts to dispute what are essentially fact issues. *See* ECF No. 115 at 1-2; *see also* ECF No. 79-1 ¶ 63 & n.10. Neither a motion to strike nor a

7:06-CV-01694, 2010 WL 11526765, at *1 (S.D.N.Y. Mar. 3, 2010) (granting sur-reply where defendants addressed arguments plaintiffs raised for the first time in reply).

Specifically, in its reply, Chanel cites *GEOMC Co.* v. *Calmare Therapeutics Inc.*, 918 F.3d 92, 95 (2d Cir. 2019) for the first time and argues that the Court should simply apply the *Twombly* pleading standard when considering a motion to strike an affirmative defense. ECF No. 115 at 2. Chanel apparently takes issue with the standard articulated in *Lokai Holdings LLC* v. *Twin Tiger USA LLC*, that the party seeking to strike the affirmative defense must show: (1) there is 'no question of fact that might allow the defense to succeed;' (2) there is 'no substantial question of law that might allow the defense to succeed;' and (3) the 'plaintiff must be prejudiced by the inclusion of the defense.'" *See* 306 F. Supp. 3d 629, 645 (S.D.N.Y. 2018); ECF No. 110 at 9. Chanel now claims that this standard articulated in *Lokai*—one of the main cases that *Chanel* relies on—is the incorrect standard and suggests that, in *GEOMC*, the Second Circuit held that this standard "is best forgotten." ECF No. 115 at 2. This misrepresentation of the *GEOMC* decision is what TRR seeks to address in a sur-reply.

As an initial matter, the *GEOMC* court noted that certain pre-*Twombly* language concerning the sufficiency of a *complaint* is best forgotten. 918 F.3d at 96 (language that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" is "best forgotten"). Thus, the *GEOMC* court did *not* state that the motion to strike standard—which has been used in this district for decades—was best forgotten.

Rather, as to the first factor (i.e., no question of fact), the *GEOMC* court simply explained that *Twombly*'s plausibility standard applies but that it "is a context-specific task" and "[t]he key aspect of the context relevant to the standard for pleading an affirmative defense is that an affirmative defense, rather than a complaint, is at issue." *Id.* at 98. "This is relevant to the degree of rigor appropriate for testing the pleading of an affirmative defense. The pleader of a complaint has the entire time of the relevant statute of limitations to gather facts necessary to satisfy the plausibility standard. By contrast, the pleader of an affirmative defense has only the 21-day interval to respond to an original complaint." *Id.* Moreover, certain affirmative defenses in which, for example, "facts needed to plead [the defense] may not be readily known to the defendant . . . [warrant] a relaxed application of the plausibility standard." *Id.* The *GEOMC* court also explained that the second factor (i.e., no substantial question of law) "needs no revision," and noted that, although the third factor (i.e., prejudice) should be considered if a party moves to amend to add an affirmative defense, a "valid defense should always be allowed *if timely filed* even if it will prejudice the plaintiff by expanding the scope of the litigation." *Id.* at 98 (emphasis

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motion to dismiss is the appropriate means for doing so. Chanel also argues, again, that TRR will need expert discovery to prove the elements of its antitrust claims. But Chanel completely ignores TRR's contention that *given that no expert discovery has yet taken place*, Chanel will not be unduly prejudiced by providing expert discovery relevant to TRR's antitrust claims in this action, as opposed to in a new, separate action. ECF No. 110 at 8.

added). For all the reasons discussed in TRR's supplemental response letter, its unclean hands affirmative defense easily satisfies this standard.

Finally, Chanel urges the Court to disregard the *Estee Lauder* decision on the basis that it applied a standard that, in 2019, was subsequently clarified by the Second Circuit in *GEOMC*. By Chanel's absurd reasoning, nearly all of its cases—including *Lokai*—should be disregarded as they were decided prior to *GEOMC*.

Because Chanel now advocates for a new standard not discussed in the prior briefing, TRR respectfully submits that it should be permitted to file a sur-reply.

Respectfully,

/s/ Karen L. Dunn
Karen L. Dunn

cc: All Counsel of Record (via ECF)